International Union, United Mineworkers of America *and* Energy West Mining Company and International Brotherhood of Electrical Workers, Local Union No. 57 and Pacificorp d/b/a Utah Power and Light Company. Case 27–CD–227

August 19, 1991

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

The charge in this Section 10(k) proceeding was filed March 6, 1991, by Energy West Mining Company (the Employer or Energy West) alleging that the Respondent, International Union, United Mineworkers of America (UMW), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign work to employees it represents rather than to employees of PacifiCorp d/b/a Utah Power and Light Company (Utah Power), represented by International Brotherhood of Electrical Workers, Local Union No. 57 (Local 57). The hearing was held April 4, 1991, before Hearing Officer Wayne L. Benson. Thereafter, the parties participating in the hearing filed briefs in support of their positions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Utah corporation, is engaged in the mining of coal in the State of Utah, where it annually receives goods valued in excess of $50,000 directly from suppliers located outside the State. Utah Power, an Oregon corporation, is a public utility engaged in the generation, transmission, and distribution of electrical energy in several States, including Utah, where it annually receives goods valued in excess of $50,000 directly from suppliers located outside the State of Utah. We find that the Employer and Utah Power are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that UMW and Local 57 are labor organizations within the meaning of Section 2(5) of the Act.[2]

[1] Local 57, following the Regional Director's denial of its prehearing motion to quash, discussed below, has not further participated in this proceeding.

[2] UMW admitted the Board's jurisdiction at the hearing. Local 57, although not participating in the instant hearing, admitted the Board's jurisdiction in Case 27–UC–122, a related proceeding discussed below.

II. THE DISPUTE

A. *Background and Facts of Dispute*

This work assignment dispute involves two coal mine water supply pumps located at the Huntington electrical powerplant in Utah, a facility operated by Utah Power. The two pumps were installed in 1987 as a result of a fire at one of the area coal mines owned by Utah Power—and currently operated by the Employer—which supply fuel for the electrical powerplant. The fire took the lives of 27 mining employees. The primary purpose of the pumps is to assure an adequate water supply in case of a fire emergency at the mines; they also provide water for, inter alia, dust control and motor cooling purposes at the mines. Although located at the powerplant the pumps are monitored and controlled through a computerized system located at the Deer Creek coal mine.

When the pumps became operational in 1987, the Mining Division of Utah Power became responsible for them. The Mining Division was created in 1986 to operate Utah Power's coal mines, functioning separately from Utah Power's electrical power branch both operationally and with regard to labor relations, according to undisputed evidence on this record. The Mining Division assigned the work of inspecting and maintaining the pumps to its employees represented by UMW, with whom it had a collective-bargaining relationship. The essence of the work in dispute has remained the same since its inception. A UMW-represented employee classified as a ''belt patrolman'' makes a visual and manual inspection of the two pumps twice daily in the course of his other duties at the power plant involving maintenance of a coal conveyor belt running between the mine area and the powerplant. The pump inspection involves several steps and routinely takes about 5 minutes. Necessary repairs to the pumps are performed by UMW-represented employees classified as mechanics. There are other water pumps in the immediate area of the Huntington plant where the two mine pumps are located. These other pumps, unlike the mine pumps, are related to the operation of the power plant and are maintained by Utah Power employees represented by Local 57. Local 57-represented employees have never inspected or maintained the mine pumps; this work has been performed exclusively by UMW employees.

In January 1988, Local 57 filed a contractual grievance with Utah Power concerning the mine pump work. The nature of the grievance, which is still pending, is that because the mine pumps are located on the Huntington power plant property, inspection and maintenance of the pumps should be done by Local 57-represented employees. On April 26, 1990, Utah Power filed a unit clarification petition, Case 27–UC–122, with the Board's Regional Office, seeking, inter alia,

to clarify that the employees performing the mine pump inspection and maintenance work are included in the UMW bargaining unit. In October 1990, while the UC petition was being processed, Energy West, the Employer, was created as a wholly-owned subsidiary of Utah Power to operate the coal mines. Similar to the Mining Division, which it effectively replaced, Energy West functions independently of Utah Power's electrical utility business, both operationally and concerning labor relations. It succeeded the Mining Division in the collective-bargaining relationship with UMW.[3]

On February 11, 1991, the Board issued an unpublished decision in Case 27–UC–122, reversing the Acting Regional Director's earlier decision and dismissing the petition to the extent it sought to clarify the UMW unit to include employees performing the mine pump work. The Board found that this matter constituted a work assignment dispute and thus was inappropriate for consideration in a unit clarification proceeding. By letter of February 28, 1991, Local 57 requested that Utah Power assign the disputed work to employees it represents, and in the alternative demanded that the parties proceed to arbitrate the outstanding 1988 grievance. Subsequently, UMW was informed by the Employer of Local 57's position and that the work would be assigned to Local 57-represented employees if an arbitrator so directed. By letter dated March 5, 1991, UMW responded, stating, inter alia, that it would ''respond to any attempt to remove this work from our jurisdiction by taking whatever action is necessary, up to and including a strike, to ensure that we continue to perform these pump maintenance duties.'' The Employer then filed an 8(b)(4)(D) charge against UMW.

A few days prior to the 10(k) hearing, Local 57 directed to the Employer a document entitled ''Notice of Disclaimer,'' which stated that it ''does not now and never has made any claim upon your company'' for the disputed work in this case. At the same time, Local 57 moved before the Regional Director to quash the notice of hearing, relying on its asserted disclaimer. The Regional Director denied the motion, finding that the ''Notice of Disclaimer'' was inconsistent with Local 57's continued pursuit of its grievance with Utah Power concerning the disputed work. Local 57 did not appeal the Regional Director's denial of the motion, and, as noted above, has not further participated in this proceeding.

[3] The facts above concerning Utah Power's relationship with the Mining Division and with Energy West are undisputed. For purposes of this decision, we take them at face value, treating each of the employers as a separate employing entity. Apart from the foregoing, we find it unnecessary to, and we do not, reach the issue of whether or not these entities constitute a single employer.

B. *Work in Dispute*

The disputed work involves mine supply pump inspection and maintenance work at the Deer Creek mine and the Huntington electrical powerplant facilities.

C. *Contentions of the Parties*

The Employer and Utah Power each contend that the Board should award the disputed work to employees represented by UMW, arguing that the factors of employer preference and past practice, area practice, collective-bargaining agreements, safety, and economy and efficiency support such a determination. They also contend that Local 57's asserted disclaimer does not represent an abandonment of its claim for the work because it is continuing to press its grievance to arbitration.

UMW asserts as well that the disputed work should be awarded to the employees it represents. It relies on the factors of employee qualifications, collective-bargaining agreements, employer preference and past practice, economy and efficiency, and area and industry practice to support its position. It also contends that Local 57's attempted disclaimer is invalid because it is not consistent with its continued pursuit of its grievance claiming the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

In January 1988, Local 57 filed a grievance with Utah Power which contended that the work in dispute should be assigned to employees it represents in view of the location of the mine pumps on the Huntington powerplant property. Local 57's letter of February 28, 1991, effectively reaffirmed its desire for the work by making an outright request for the assignment and demanding arbitration of the pending grievance should Utah Power not accede. Local 57's conduct clearly constitutes a claim for the work in dispute.[4]

[4] In view of Local 57's failure to appeal or otherwise preserve the issue, the Regional Director's denial of its motion to quash the notice of hearing is not properly before us. In any event, we find that Local 57's ''Notice of Disclaimer'' was ineffective to renounce its interest in the disputed work. We reach this conclusion in view of the asserted disclaimer's equivocal language, i.e., it stated only that the local made no claim against *Energy West* rather than disclaiming interest in the work itself, and because the local's continued pursuit of its grievance is inconsistent with its purported disclaimer. See, e.g., *Iron Workers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1, 2 (1988).

Chairman Stephens, noting that Local 57's grievance does not involve a lawful union signatory subcontracting clause in the construction industry, finds his dissenting view in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), not properly applicable here. He also notes that Local 57's letter specifically requests the work as well as demanding arbitration of its grievance.

UMW, by its letter of March 5, 1991, reacted to the information that the disputed work might be taken away from the employees it represents by stating that it would take ''whatever action is necessary, up to and including a strike'' to safeguard the right of employees it represents to continued performance of the work. The 8(b)(4)(D) charge was filed in light of UMW's conduct.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Further, it is apparent on this record that there is no agreed method binding all the parties to a voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment, based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreements[5]

The broadly worded work jurisdiction provision of the current collective-bargaining agreement between the Employer and UMW (the Bituminous Coal Wage Agreement of 1988) is interpretable as covering the work in dispute.[6] Evidence in the form of arbitration decisions involving UMW and predecessors of the Employer, although not on point with the work dispute issues here, do tend to support the contention that ''water pump work'' at, near, or relating to the mines is unit work under the contract. It is apparent that the agreement between UMW and the Employer at least arguably covers the disputed work.

In addition, Energy West, the employer that, as established on this record, controls the assignment of the work in dispute, is not signatory to a collective-bargaining agreement with Local 57. Thus, Local 57 has no contractual basis for a claim to the work. In any event, even if we were to assume, arguendo, that Utah Power ultimately controls the disputed work, there is no language in its 1990 and 1991 agreements with Local 57, placed in evidence by the parties at the hearing, that even arguably covers the work in dispute.

We find that the factor of collective-bargaining agreements favors an award of the work to the employees represented by UMW.

2. Employer preference and past practice

The Employer's stated preference is that employees represented by UMW perform the work in dispute. Since the company's inception in October 1990 it has assigned the work to those employees. Also, it is noteworthy that the Mining Division, the Employer's predecessor, assigned the work to employees represented by UMW from the time the mine supply pumps were installed in 1987. It is thus apparent that since the work has become available it has been performed exclusively by the UMW-represented employees. The employer preference and past practice factor favors an award of the disputed work to the employees represented by UMW.

3. Area and industry practice

There was undisputed testimony that in most of the western United States, including Utah—the location of the disputed work—underground coal mine operators use a water pumping system at their mines similar in function to the Employer's. At each of these mines, UMW-represented employees, if present, rather than any other employee group, operate, maintain, and repair the mine pumps. One of these other mine locations is adjacent to a powerplant, and the mine supply pumps are located on powerplant property, close by water pumps serving the powerplant. In that situation, quite similar to the Employer's, the mine supply pumps are maintained by UMW-represented employees, and the power plant pumps are maintained by other employees.

We find that area practice favors an award to employees represented by UMW.[7]

4. Economy and efficiency of operations

The parties participating at the hearing and briefing the issues before us agreed that it is more economical and efficient for UMW-represented employees to perform the disputed work. However, there is scant evidence to support this view. For example, the Employer contends that it would be a ''great expense'' to train employees represented by Local 57 to perform the work if awarded to them; yet there is no significant evidence to support this claim. We find that the evi-

[5] There is no record evidence concerning any Board certification relevant to the determination of this dispute.

[6] Art. 1A(a) states in relevant part:

> The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement.

[7] Concerning industry practice, evidence supporting the contention that mine water pumps throughout the United States are operated and maintained by UMW-represented employees was scant, vague, and therefore insufficient.

dence relating to the economy and efficiency factor is inconclusive, and that this factor does not favor an award of the disputed work to either employee group.

5. Relative skills and safety

The parties do not dispute that both employee groups possess the essential knowledge, ability, and skills to perform the disputed work. However, with respect to safety-related qualifications, it is also undisputed that UMW-represented employees, unlike Local 57 employees, are required to be, and are, trained pursuant to regulations of the Federal Mine Safety and Health Administration (MSHA) and to a more limited extent pursuant to state law, in order to carry out the work in dispute, as well as other mine-related duties. We find that the evidence relating to this factor favors an award to the UMW-represented employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the UMW are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area practice, and safety qualifications. In making this determination, we are awarding the work to employees represented by the UMW, not to that Union or its members. This determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Energy West Mining Company, represented by International Union, United Mine Workers of America, are entitled to perform mine supply pump inspection and maintenance work at the Deer Creek mine and the Huntington electrical powerplant facilities, near Huntington, Utah.